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Supreme Court, U.S.
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No. 08-09-90

IN THE

Supreme Court of the United States

KATHLEEN PIERCE; MATTHEW MORGAN,

Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the District Court's orders granting respondent San Diego Port District's motions for summary judgment against petitioners Kathleen Pierce and Matthew Morgan. In so doing, the Ninth Circuit erroneously ruled that Petitioners' due process claim fails as a matter of law. However, the Ninth Circuit's ruling completely ignores the fact that the District Court erred in its interpretation of California Harbors and Navigation Code section 500 *et seq.* and San Diego Unified Port District Code sections 4.35 and 8.25. This error resulted in a violation of Petitioners' right to due process.

One Question is presented:

1. Whether a conflict in statutory law resulted in a violation of Petitioners' due process rights.

LIST OF PARTIES

The parties to the proceeding below are identified in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

The San Diego Unified Port District is a public agency organized and existing under the provisions of the San Diego Unified Port District Act.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is not reported but is available electronically at 2009 WL 1069292. The final judgment of the United States District Court for the Southern District of California is unpublished and reproduced at Pet. App. G. The unpublished decisions of the district court are transcribed and reproduced at Pet. App. B through F.

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was rendered on April 22, 2009. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. amend XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of the San Diego Unified Port District Code ("UPD") and California Harbors and Navigation Code ("HNC") involved in this case, including UPD §§ 4.35 and 8.25 and HNC §§ 504, 522, and 526 are set forth at Pet. App. G, ***-***.

STATEMENT OF THE CASE

Background of Facts and Issues

The underlying dispute in this matter involves a two story floating vessel nicknamed "the Castle", which was located in the San Diego Bay. At some time after completion, Petitioner Morgan became the owner of the Castle, while Petitioner Pierce held a security interest in the vessel.

For years, the Castle was used by a number of groups, mostly comprised of minorities. During this time, several lawsuits were filed by Respondent to remove "the Castle" from the Bay, including two suits on July 29, 1992 for permanent injunction and declaratory relief. Before those cases proceeded to trial, however, a settlement was reached between then Port Director Don Nay and the then owner of "the Castle" by which Respondent agreed to dismiss its suit in exchange for "the Castle" being moved to the A-8 anchorage in central San Diego Bay.

Due to the A-8 anchorage's poor location, however, it was necessary that "the Castle" be anchored outside of the A-8 boundary limits because heavy winds could push the structure around causing

damage to other boats. As such, another agreement was made between then Port Director Don Nay and the then-owner of "the Castle" whereby "the Castle" would be anchored a fair distance outside of the A-8 anchorage so that it could swing freely in the event of high winds.

Despite this settlement, on January 22, 2002, Respondent set out to remove "the Castle" from San Diego Bay. To this end, Respondent seized the Castle for violation of UPD Code section 4.35(c)(6), however, no civil injunction was ever filed by the Respondent. At the same time, Respondent also seized a number of Petitioners' smaller vessels that were within the A-8 anchorage. All of these vessels were registered with the DMV.

Petitioners assert in this case that Respondent lacked any authority whatsoever to seize and destroy their vessel commonly known as "The Castle" and clearly failed to follow the procedural guidelines of its own ordinances and those of the HNC as required under the due process clause.

In particular, Petitioners allege that Respondent had no authority to seize and destroy "The Castle" for failing to comply with UPD Code section 4.35 (c)(6). In 2002, at the time of Respondent's seizure and destruction of "The Castle", the only available enforcement process for violation of Section 4.35 was a civil injunction. As such, "The Castle's" seizure and destruction violated Petitioners' due process rights as a matter of law.

In this regard, Respondent violated Petitioners' due process rights by not meeting the procedural prerequisites and then subsequently failing to perform a noticed lien sale of Petitioners' seized vessels under HNC Code sections 504, 522 and 526. As such, Respondent denied Petitioners a final right of redemption of their personal property in violation of their due process rights.

Indeed, Respondent had no authority to summarily destroy Petitioners' property since it failed to follow the procedural guidelines required under UPD Code section 8.25 and HNC sections 504, 522, and 526. Vessels registered with the California Department of Motor Vehicles ("DMV"), such as "The Castle" and Petitioners other seized vessels, should have been offered under a noticed lien sale, not destroyed.

Respondent failed to comply with clear statutorily required procedures for dealing with Petitioners' property under HNC Code section 526. Section 526 requires that any "derelict", "hulk", "unseaworthy" or "abandoned" vessel may only be sold or "otherwise disposed of" subject to certain conditions which were not met. Respondent failed to provide adequate prior notice of seizure of "The Castle" to the legal owners of the vessel. Petitioners never had actual notice of the seizure and destruction of their property. To the end, Respondent also failed to provide any notice of the statutorily required lien sale that should have taken place with respect to Petitioners' property.

Proceedings Before the District Court

After several of Petitioners' vessels were impounded from San Diego Bay and destroyed, Petitioners each separately filed suit against Respondent on January 27, 2003, in the United States District Court for the Southern District of California.

After successive challenges to his original pleading, Petitioner Matthew Morgan filed a Third Amended Complaint ("TAC") on March 10, 2004. Petitioner Kathleen Pierce filed her Second Amended Complaint ("SAC") on November 7, 2003. Respondent answered Pierce's SAC and amended its answer to Morgan's TAC on May 27, 2004, adding counterclaims for the cost of removal and destruction. Petitioners then both answered Respondent's counterclaim on June 8, 2004. Prior to that time, Pierce's second claim had been dismissed by the court.

Thereafter, on September 30, 2004, Respondent filed a motion for summary judgment against Pierce and on October 4, 2004, filed a similar motion against Morgan as to all of Petitioners' claims. Following those motions, on February 2, 2005, the court only dismissed Petitioners' third claim for ordinance invalidity and seventh claim for ordinance unconstitutionality and narrowed the first claim for violation of civil rights, leaving Petitioners' claims of negligence and due process violations against Respondent.

On March 13, 2006, Petitioners' cases were consolidated with each other and with case number 04cv 1695-IEG(AJB), that of plaintiff James Ward ("Ward").

On April 4, 2006, Respondent filed a motion for summary adjudication as to Respondents' due process claims. Respondent's motion was then granted by an order dated July 7, 2006 that was filed by the court on July 10, 2006.

Finally, on August 28, 2006, Respondent filed a motion for judgment on the pleadings, alleging a failure to state a claim for relief as to Petitioners' one remaining claim for negligence. After Petitioners' cases were unconsolidated from that of Ward, the district court granted Respondent's motion on December 6, 2006, treating it as a motion for summary judgment.

At that point, the only remaining issue was Respondent's counterclaim against Petitioners. That counterclaim was determined in another motion for summary judgment filed by Respondent on February 15, 2007 and decided on March 23, 2007 in favor of Respondent. Final judgment in the case was thereafter entered by the court on the same day.

Decisions of the District Court

The district court erred in dismissing Petitioners' action against Respondent due to its interpretation of several statutory provisions, including San Diego Unified Port District Code sections 4.35 and 8.25, and Harbors and Navigation Code section 500, *et seq.*

The result was the dismissal of Petitioners' due process claims, which effectively relieved Respondent of its statutory obligation to prove a violation, notify the known owners, and fulfill any other safeguards before

the unilateral impoundment and destruction of any vessel located in the San Diego Harbor or in the A-8 Anchorage.

The interpretation of the district court was, therefore, contrary to the provisions of the due process clause and was made without reference to evidence demonstrating the intent of Respondent and varying past application of the law.

Decision of the Ninth Circuit

The Ninth Circuit affirmed the district court's orders granting Respondent's motions for summary judgment against Petitioners. In so doing, the Ninth Circuit erroneously ruled that Petitioners' due process claim failed as a matter of law. However, the Ninth Circuit's ruling completely ignores the fact that the district court erred in its interpretation of HNC Code section 500 *et seq.* and UPD sections 4.35 and 8.25. This error resulted in a violation of Petitioners' right to due process.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners respectfully submit that this Court should grant their petition for writ of certiorari and review the Ninth Circuit Court of Appeal's decision because a compelling reason exists to do so. In particular, the Ninth Circuit sanctioned the rulings of the district court, which so far departed from the accepted and usual course of application of the constitutional right to due process, as to call for an exercise of this Court's supervisory power as follows:

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE LAW APPLICABLE TO CONSTITUTIONAL DUE PROCESS.

A due process claim "hinges on proof of two elements: 1) a protectable liberty or property interest, and 2) a denial of adequate procedural protections."[*Foss v. Nat '1 Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)]. As this Court held in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483- 484 (1986), municipal liability under 42 United States Code section 1983 attaches where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. [*Pembaur v. City of Cincinnati*, 475 U.S. 469, 483- 484 (1986)].

In this case, both the district court and the Ninth Circuit found that no violation of Petitioners' due process rights occurred because applicable regulations had been adequately followed. This finding, however, was the result of the court's misinterpretation and misapplication of statutory law, as well as a failure to consider outstanding factual issues.

Indeed, initially the district court expressly found that Respondent is a final decision maker due to its authority to determine whether a vessel is abandoned and its ability to arrange for such vessel's removal and/or destruction under San Diego Port District Code

section 8.25 and California Harbor and Navigation Code section 522. [Pet. App. B and C,]. As a result the district court denied Respondent's initial Motion for Summary Judgment. [Pet. App. B and C].

Thereafter, Respondent filed a subsequent Motion for Summary Adjudication in which it argued that no triable issue of fact existed since notices of the vessels' seizure and opportunity for hearing were sent out but never received by the registered owners of the vessels. Both the district court and the Ninth Circuit erroneously agreed. [Pet. App. A, D].

The orders of both the district court and Ninth Circuit, however, were in error because simply sending a notice in and of itself does not relieve Respondent of any further procedural due process requirements under the law. In fact, Respondent violated its own ordinances and the statutory notice requirements of the Harbors and Navigation Code as shown below. As a result, Respondent violated Petitioners' due process rights under 42 United States Code section 1983, and the instant Petition should be granted.

1. Respondent Violated Petitioner's Due Process Rights Since It Seized and Destroyed "The Castle" for A Violation of UPD § 4.35(c) (6), An Infraction Which Provided A Civil Injunction Remedy As Its Only Means of Enforcement.

On January 29, 2002, Respondent set out to seize "the Castle" for violation of UPD section 435(c)(6). At

the time of the seizure, Section 4.35 (c)(6) prohibited unauthorized anchoring in central San Diego Bay. [Pet. App. G]. However, at the time of the seizure, Section 4.35 's only means for enforcement was a civil injunction. [Pet. App. G].

No civil injunction was undertaken in 2002 by the Respondent as required by law. Instead Respondent simply seized and destroyed "The Castle" in disregard of its own ordinances and procedures, as well as Petitioners' due process rights.

In its Mandate, the Ninth Circuit ruled that Respondent was not required to seek an injunction in order to enforce a violation of UPD section 4.35 because UPD section 8.25 was in existence at the time of the seizure of "the Castle," and section 8.25 did not require Respondent to seek an injunction. [Pet. App. A].

This, however, does nothing to excuse the due process violations which occurred in this case. Indeed, even if Respondent had authority to seize and destroy "The Castle" and Petitioners' other vessels in San Diego Bay under UDP section 8.25 and Harbors and Navigation Code section 500, *et seq.* it still violated Petitioners' due process rights. In particular, the Respondent did not comply with the notice procedure required by UDP section 8.25(a)(5).

UDP section 8.25 gives Respondent authority and sets out the procedural guidelines to remove water craft found in violation of the law. [Pet. App. G, UDP § 8.25]. Section 8.25(a)(4) gives Respondent authority to destroy vessels after notice is given and no owner reclaims the

vessel after thirty days. [Pet. App. G, UDP § 8.25(a)(4)]. However, the applicable section of the Code in this matter is not section 8.25(a)(4). [Pet. App. G, UDP § 8.25(a)(4)].

UDP 8.25(a)(5) is the relevant section as it requires that Harbors and Navigation Code section 500, *et seq.* govern the disposition of any vessel registered with the DMV. [Pet. App. G, UDP § 8.25(a)(5)]. All of Petitioners' seized and destroyed vessels were registered with the DMV as the Ninth Circuit recognizes in its Mandate. [Pet. App. A}.

Section 522 of the Harbors and Navigation Code is entitled "Abandoned hulks within municipal limits; disposition; claim of ownership; fee". Section 522 is the relevant statutory section for this matter since the seized vessels were all registered with the DMV. [Pet. App. G, CA Harbors & Nav. C. § 522]. Respondent violated Petitioners' due process rights by failing to properly dispose of the vessels by way of noticed lien sale.[Pet. App. G, CA Harbors & Nav. C. § 522(b)]. Section 522(b) states:

> "If a registration number appears on the watercraft, the municipal corporation or other public corporation or entity shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under Section 504."

Respondent did not even attempt to comply with Section 504, which sets out the procedural requirements for conducting a lien sale. [Pet. App. G, CA Harbors &

Nav. C. § 504]. In fact, no lien sale was ever conducted. Respondent failed to have an independent appraiser make a value determination of the seized vessels as required by Section 504(a) and it did not make any reference to the specific date of the required lien sale as required by Section 504(d). [Pet. App. G, CA Harbors & Nav. C. § 504(a), (d)]. In fact, Respondent failed in every instance to comply with requirements of Section 504.

Instead Respondent made a final decision, contrary to the law and in violation of Petitioners' due process rights to not conduct a lien sale, but instead to destroy the vessel. Since no lien sale was ever conducted by Respondent, Petitioners' last opportunity at redemption was lost and their due process rights were violated as a matter of law.

2. Respondent Failed to Comply with the Procedural Requirements of Harbors and Navigation Code Section 526 in Violation of Petitioners' Due Process Rights.

California Harbors and Navigation Code section 526 must be read in conjunction with Section 522 as it sets out the procedural requirements necessary before disposition of a vessel. [Pet. App. G, CA Harbors & Nav. C. §§ 522, 526]. In particular, Section 526(a) includes five prerequisites for the sale or disposal of an unseaworthy vessel as follows:

(1) The property has to be appraised by disinterested persons to have an estimated value of less

than two thousand dollars ($2,000);

(2) There has to be no discernable registration, license, hull identification number, or other identifying insignia on the property, or the Department of Motor Vehicles is unable to produce any record of the registered or legal owners or lien holders;

(3) Not less than 72 hours before the property was removed, Respondent had to securely attach to "the Castle" a distinctive notice stating that the property would be removed by the public agency;

(4) Within 48 hours after the removal, excluding weekends and holidays, the public agency that removed or caused the removal of the property sent notice of the removal to the registered and legal owners, if known or discovered subsequent to the removal, at their addresses of record with the Department of Motor Vehicles, and to any other person known to have an interest in the property; and

(5) If the public agency is unable to locate the registered and legal owners of the property or person known to have an interest in the property as provided in paragraph (4), the public agency published, or caused to be published, the notice of removal for at least two weeks in succession in one or more daily newspapers circulated in San Diego County. [Pet. App. G, CA Harbors & Nav. C. § 526(a)].

Respondent failed to comply with at least four of the five procedural requirements necessary prior to disposition. This action by Respondent was a violation

of Petitioners' due process rights which has gone unchecked by both the district court and the Ninth Circuit.

3. The Lower Courts Incorrectly Relied On Section 8.25 In Finding That The PORT Had Authority To Support Its Actions.

Ultimately, the lower courts both based their finding of Respondent's authority to remove and destroy "the Castle" based upon the provisions of UPD section 8.25, which provided for removal and impoundment of vessels or watercraft found in violation of the Code in accordance with procedures enumerated in that section. However, the seizure notice issued by Respondent to provide notice to vessel owners only referenced an entirely different section, section 4.35, which at that time made no provision for the seizure of vessels under section 8.25. [Pet. App. G, UPD § 8.25].

Although both lower courts found that the Respondent's seizure of the Castle was authorized by UPD section 8.25, it was not until section 4.35 was amended *in 2004* – two years after the Castle was seized and destroyed – that enforcement was allowed through Section 8.25. Since the seizure at issue in this case took place in 2002, only section 4.35 was applicable and the lower courts erred in finding otherwise. [Pet. App. G, UPD § 8.25].

In particular, the actual seizure notice issued in this case, and as a matter of procedure sent to boat owners, only referenced section 4.35(c)(6). In 2002,

section 4.35(c)(6) placed a prohibition on the anchoring of vessels within San Diego Bay, except as otherwise permitted within particular anchorage areas. Moreover, Section 4.35(d), entitled -Injunctive Relief', set forth the sole applicable remedy for violation of section 4.35: "The San Diego Unified Port District may seek relief from the appropriate court to restrain or enjoin any violation of this Section." [Pet. App. G, UPD § 4.35(d)].

Although the entire section was later modified, eliminating the Injunctive Relief remedy and replacing it with a reference to section 8.25(a), that modification took place in 2004 — *after* the seizure and destruction of the Castle, but *during* litigation of the underlying matter.

Moreover, there was no notification or basis for Section 8.25's application in 2002 when the Castle was seized and destroyed. Therefore, since neither the seizure notice, nor UPD section 4.35(c), the section under which the vessel was seized, referred at all to section 8.25, the lower courts were incorrect in analyzing Respondent's actions under that code section.

To find otherwise would allow Respondent to issue a notice of a violation under one section apprising the offender of his or her remedies, then to proceed covertly under another section providing for entirely different remedies. This result undermines the entire purpose of providing notice and prevents an adequate and informed response in violation of the due process clause.

4.. Sections of the Code Are, At Best, Conflicting.

The only support that the district court provides in its order for the application of section 8.25 is a conclusory note that section 8.25 was amended on September 4, 2001 to apply to UPD section 4.35 violations. [Pet. App. D]. However, the amendment to which the court refers still does not evince an intent to specifically join section 4.35 with section 8.25 and extend the available remedies.

Likewise, the Ninth Circuit merely states that Respondent was not required to seek an injunction in order to enforce a violation of UPD section 4.35 because UPD section 8.25 "was in existence at the time of the seizure of the case, and section 8.25 did not require the Port to seek an injunction." [Pet. App. A].

If these interpretations are accurate, however, the Code sections are, at best, conflicting. That is because, as described, the former section 4.35 provided only for injunctive relief, while section 8.25 allows for entirely different enforcement. It was not until the 2004 amendment, in which the section 4.35 injunctive relief remedy was eliminated and replaced with a recourse identical to that in section 8.25, that the two sections could be read as the court suggests without a conflict.

The former discrepancy existing prior to amendment indicates a lack of intent by Respondent's Board that UDP section 8.25 trump another, equivalent code section, 4.35. As a result, the lower courts both erred in interpreting section 8.25 and section 4.35 as

connected prior to the 2004 amendment.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT RELIED ON AN ERRONEOUS FACTUAL DETERMINATION

In its Mandate, the Ninth Circuit expressly found that ". . .Pierce and Morgan have not presented sufficient evidence to create a genuine issue of material fact of whether the former Port Director Don Nay had the authority to allow and authorized the Castle to rest in the location from which it was seized." [Pet. App. A}. This, however, is not correct.

Specifically, UPD Section 8.25(a)(2) gives the port executive director the power to enter into contracts with private citizens regarding anchoring within port tidelands. Specifically, Section 8.25(a)(2) reads as follows:

> "The Executive Director is authorized to enter into contracts, on behalf of the District, with private parties for the removal and impounding of any vessel, watercraft or object found in violation of any Federal or State law or provision of this Code." [Pet. App. G, UPD § 8.25(a)(2)].
>
> Thus, Petitioners had no obligation to produce evidence to create a genuine issue of material fact as to whether the former Port Director Don Nay had the authority to allow and authorized the Castle to rest in the location from

which it was seized because he had this authority as a matter of law.

Thus, this ground upon which the Ninth Circuit based its determination that Petitioners' due process claim fails as a matter of law is erroneous and should be reversed.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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